

# HIGH COURT OF AUSTRALIA

GAGELER CJ,  
GORDON, EDELMAN, STEWARD AND JAGOT JJ

---

REAL ESTATE TOOL BOX PTY LTD & ORS APPELLANTS

AND

CAMPAIGNTRACK PTY LTD & ANOR RESPONDENTS

*Real Estate Tool Box Pty Ltd v Campaigntrack Pty Ltd*  
[2023] HCA 38

*Date of Hearing: 1 August 2023*

*Date of Judgment: 6 December 2023*

S16/2023

## ORDER

1. *Appeal allowed.*
2. *Set aside the orders made by the Full Court of the Federal Court of Australia on 6 July 2022 and 19 July 2022, and, in lieu thereof, order that the appeal be dismissed with costs.*
3. *The first respondent pay the appellants' costs of the appeal to this Court.*

On appeal from the Federal Court of Australia

## Representation

B W Walker SC with H P T Bevan SC and J E McKenzie for the appellants  
(instructed by Mills Oakley)

M Green SC with W H Wu for the first respondent (instructed by McLean &  
Associates Solicitors)



2.

No appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Real Estate Tool Box Pty Ltd v Campaigntrack Pty Ltd**

Copyright – Infringement – Authorisation of infringement – Where s 36(1) of *Copyright Act 1968* (Cth) relevantly provides copyright is infringed by person who, not being owner of copyright, and without licence of owner of copyright, "authorizes the doing in Australia" of any act comprised in copyright – Where first respondent owner of copyright in cloud-based real estate marketing system "DreamDesk" – Where fifth appellant ("Mr Stoner") director of second appellant ("Biggin & Scott") – Where Mr Stoner instructed second respondent ("Mr Semmens") to build web to print delivery system software that does not breach other companies' copyright – Where Mr Semmens and others developed "Real Estate Tool Box" software ("Toolbox") – Where Mr Stoner and sixth appellant ("Ms Bartels") established first appellant ("Real Estate Tool Box Pty Ltd") – Where Mr Semmens reproduced "DreamDesk Source Code Works", "DreamDesk Database and Table Works" and "DreamDesk PDF Works" in creating Toolbox – Where use of Toolbox involved reproduction of DreamDesk Source Code Works – Whether Biggin & Scott, Mr Stoner, Ms Bartels and Real Estate Tool Box Pty Ltd ("Biggin & Scott parties") infringed copyright in DreamDesk Source Code Works by authorising infringing acts of Mr Semmens and others in developing Toolbox and of users in using Toolbox – Whether Biggin & Scott parties infringed copyright in DreamDesk Database and Table Works by authorising infringing acts of Mr Semmens and of users in using Toolbox.

Copyright – Infringement – Authorisation of infringement – Where Toolbox developed at third appellant's ("Dream Desk Pty Ltd") premises – Where fourth appellant ("Mr Meissner") sole director and shareholder of Dream Desk Pty Ltd – Where Dream Desk Pty Ltd staff assisted Toolbox development – Where DreamDesk Pty Ltd and Mr Meissner ("DDPL parties") participated in Toolbox development – Whether DDPL parties infringed copyright in DreamDesk Database and Table Works and DreamDesk PDF Works by authorising infringing acts of Mr Semmens.

Words and phrases – "any act comprised in the copyright", "authorisation", "duty of control", "indifference", "infringement of copyright", "intellectual property", "nature of any relationship", "on notice of copyright infringement", "permission", "power to prevent", "reason to suspect", "reasonable person", "reasonable steps to prevent or avoid", "sanction, approve, countenance".

*Copyright Act 1968* (Cth), ss 36(1), 36(1A).



1 GAGELER CJ, GORDON, EDELMAN, STEWARD AND JAGOT JJ. This  
appeal deals with a person's liability for infringing copyright under s 36(1) of the  
*Copyright Act 1968* (Cth) by "authorising" the doing by another person of any act  
comprised in the copyright.

2 Mr Semmens (the second respondent) is a software developer who  
infringed copyright in software called "Process 55" when he helped create a  
cloud-based real estate marketing system named "DreamDesk". Since 2015,  
DreamDesk had been used by a real estate agency known as Biggin & Scott  
Corporate Pty Ltd ("Biggin & Scott") (the second appellant) under a licence  
conferred by Dream Desk Pty Ltd ("DDPL") (the third appellant). Prior to that,  
Biggin & Scott had used a competing platform called "Campaigntrack".

3 Following Mr Semmens' admitting in 2016 to the infringement of  
copyright, DDPL sold DreamDesk to Campaigntrack Pty Ltd ("Campaigntrack  
P/L") (the first respondent). Campaigntrack P/L purchased the rights in both  
DreamDesk and Process 55 in order to shut down DreamDesk and to persuade  
customers to move or return to Campaigntrack.

4 Biggin & Scott did not want to return to Campaigntrack. Mr Stoner (the  
fifth appellant), a director of Biggin & Scott, instructed Mr Semmens "to build a  
web to print delivery system that does not breach any other companies IP or  
ownership". This led to the development of the "Real Estate Tool Box" software  
("Toolbox") and the incorporation of Real Estate Tool Box Pty Ltd ("RETB") (the  
first appellant).

5 Mr Stoner constantly sought assurances from Mr Semmens that he had  
complied with his instructions in creating Toolbox. However, unbeknownst to  
Biggin & Scott, Mr Stoner and others, in developing Toolbox Mr Semmens (and  
developers working under his supervision) had in fact infringed copyright in  
DreamDesk, now owned by Campaigntrack P/L. Mr Semmens had reproduced the  
whole or parts of the "DreamDesk Source Code Works", "DreamDesk Database  
and Table Works" and "DreamDesk PDF Works" in creating Toolbox. Moreover,  
the use thereafter of Toolbox involved a reproduction of a substantial part of the  
DreamDesk Source Code Works.

6 On appeal to this Court, there was no dispute that Campaigntrack P/L's  
copyright in DreamDesk had been infringed by Mr Semmens developing Toolbox

Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Jagot J

2.

and by users of Toolbox, in the ways just described.<sup>1</sup> At issue were the findings by a majority of the Full Court of the Federal Court of Australia that the appellants had infringed the copyright of Campaigntrack P/L by "authorising" the infringing acts of Mr Semmens and others. In this respect, the appellants broadly fell into two groups. Campaigntrack P/L made different allegations of infringement of copyright against the two groups.

7       The first group, "the Biggin & Scott parties", comprised Biggin & Scott, the franchisor of Biggin & Scott real estate agencies in Victoria; two directors of that company, namely Mr Stoner and Ms Bartels (the latter, the sixth appellant); and RETB. RETB had been established by Mr Stoner and Ms Bartels as the corporate trustee of a unit trust ("the RETB Unit Trust") probably formed to own Toolbox. The issue in this Court was whether the Biggin & Scott parties: (i) infringed the copyright in the DreamDesk Source Code Works<sup>2</sup> by authorising the infringing acts of Mr Semmens and others in developing Toolbox and of users in using Toolbox; and (ii) infringed the copyright in the DreamDesk Database and Table Works<sup>3</sup> by authorising the infringing acts of Mr Semmens and of users in using Toolbox.

8       The second group, "the DDPL parties", comprised DDPL and its sole director and shareholder, Mr Meissner (the fourth appellant). Some of the details were unclear concerning the relationship between the Biggin & Scott parties, on the one hand, and the DDPL parties, on the other. But it is clear that in early 2015, DDPL was incorporated, inferentially by Mr Meissner, and that Mr Meissner held all the shares in DDPL. Mr Meissner also ran an advertising business through JGM Advertising Pty Ltd ("JGM"). The issue in this Court was whether the DDPL

---

1     Mr Semmens did not appeal the orders made against him and did not appear in this Court.

2     The DreamDesk Source Code Works were the literary works that comprised the source code for the DreamDesk system.

3     The DreamDesk Database Work was the DreamDesk database as a literary work and the Table Works were the literary works comprised in the tables in the DreamDesk database.



3.

parties infringed the copyright in the DreamDesk Database and Table Works and the DreamDesk PDF Works<sup>4</sup> by authorising the infringing acts of Mr Semmens.

9           Although the acts that were allegedly authorised were different for the two groups, as explained below there were limited factual findings at trial that were relevant to these different acts. Moreover, the nature of the case against the appellants also changed on appeal. In that light, it is necessary in these reasons generally to address the questions of alleged authorisation at the level of the development of Toolbox. At that higher level of generality, the issues for determination on this appeal are whether the appellants had "authorised" those infringing acts within the meaning of s 36(1) of the *Copyright Act*.

10           For the reasons given below, none of the appellants authorised the acts comprising the infringement of copyright. The appeal should be allowed.

### **The development of DreamDesk and Toolbox**

11           Whether a person has authorised an infringing act within the meaning of s 36(1) of the *Copyright Act* will depend upon the proper inference to be drawn from all of the facts of the case.<sup>5</sup> It is therefore necessary to set out those facts in some detail.

#### *Development of DreamDesk*

12           In late 2014, Mr Semmens, and his business partner Mr Ewart, met Mr Meissner. They wanted Mr Meissner to invest in a new cloud-based real estate marketing system they proposed to develop. This was DreamDesk. They subsequently agreed to form a company. Upon recoupment of Mr Meissner's initial investment, the original plan was for the shares in DDPL, incorporated in 2015, to be held as to 40% each by Mr Semmens and Mr Ewart with the balance held by Mr Meissner. As matters eventuated, Mr Meissner remained at all times the sole shareholder in DDPL. The details of this arrangement remain unclear. However,

---

4     The DreamDesk PDF Works were the literary or artistic works comprised in the PDFs in the "client\_data" folder.

5     *Roadshow Films Pty Ltd v iiNet Ltd [No 2]* (2012) 248 CLR 42 at 48 [5], 67 [63] per French CJ, Crennan and Kiefel JJ, 84 [125], 89 [142]-[143] per Gummow and Hayne JJ.

Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Jagot J

4.

the primary judge found that Mr Semmens became an independent contractor of DDPL whilst he worked on developing DreamDesk.

- 13 In the first half of 2015, Mr Ewart approached Mr Stoner and persuaded him to have Biggin & Scott move to using DreamDesk. In the past, Biggin & Scott had been a user of Campaigntrack. On 20 May 2015, a licence agreement was entered into between Biggin & Scott and DDPL, and on 17 August 2015 Biggin & Scott went "live" with the DreamDesk platform.

*Mr Semmens admits infringement of copyright*

- 14 In May 2016, Mr Semmens admitted that he had copied a web-based real estate marketing system, called "Process 55", when he developed DreamDesk. At that time, the intellectual property comprising Process 55 was owned by The Digital Group Pty Ltd ("Digital Group"), a competitor of DDPL. Mr Semmens had earlier been involved in the development of Process 55 when he had been employed by Digital Hive Pty Ltd ("Digital Hive"). Digital Hive sold its business, including ownership of the intellectual property comprising Process 55, to Digital Group in 2013.

- 15 Mr Meissner now realised that DDPL owned a software system which used intellectual property owned by a third party. He was "shocked" that Mr Semmens had used Process 55 in the development of DreamDesk. He decided either to buy Process 55 or to sell DreamDesk. Meanwhile, Campaigntrack P/L, and another company called New Litho Pty Ltd ("New Litho"), decided to acquire both Process 55 and DreamDesk, and then shut down DreamDesk in order to procure DDPL's clients. Details of the exact arrangement between Campaigntrack P/L and New Litho also remain unclear.

- 16 In July 2016, the DDPL parties entered into an agreement for the sale of intellectual property associated with the operation of the DreamDesk business to Campaigntrack P/L and New Litho. The purchase price was \$50,000. Campaigntrack P/L and New Litho agreed to grant DDPL a licence to use DreamDesk for the purpose of operating the DreamDesk business until 3 October 2016 (unless extended by the agreement of the parties). In August 2016, Digital Group sold the rights to Process 55 to Campaigntrack P/L and New Litho.

*The development of Toolbox*

- 17 On 3 August 2016, Mr Semmens met Mr Stoner at the Biggin & Scott head office and said that he could create a system with similar functionality to DreamDesk and Campaigntrack. Mr Semmens was given a letter by Mr Stoner, on

<i>Gageler</i>	<i>CJ</i>
<i>Gordon</i>	<i>J</i>
<i>Edelman</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Jagot</i>	<i>J</i>

5.

the letterhead of Biggin & Scott, instructing Mr Semmens to develop such a system. However, the letter made clear that Mr Semmens, in creating this new system, was not to use the intellectual property of other companies, especially the intellectual property comprising DreamDesk and Campaigntrack, without a licence. The letter was signed by Mr Stoner but not by Mr Semmens. It is necessary to set it out in full:

"David Semmens

You are instructed to build a web to print delivery system that does not breach any other companies IP or ownership, in particular Dream Desk or Campaign Track.

All products used should be off the shelf products owed by 3rd parties with a licence agreement or able to be used through open code or any other industry standard that classes the use as open (can not be claimed)

All fields should match industry standard so as to be delivered as per their specs and able to match our CRM's in particular Box & Dice.

In simple terms we do not want any thing used that can be claimed as owned by the 2 companies above.

We are happy with E-DOC being used as the PDF delivery system as long as it can deliver our finished adds as per Biggin & Scott style guide. Please continue with the building of these templates.

With regards to property data that offices are loading into the Dream Desk system please arrange to migration scripts of this data to be loaded into the New E-doc templates to minimise as much disruption as possible.

We have an agreement in place with Jon Meisner regarding office and property data to which Jon assures me our clients and offices data is and always will be ours and is not part of his deal." (errors in original)

18        It was found at trial, and not challenged on appeal, that Mr Stoner "trusted Mr Semmens not to infringe the intellectual property rights of DDPL or Campaigntrack in developing the new system".<sup>6</sup> Mr Stoner had said in cross-

---

6        *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2021) 160 IPR 362 at 376 [43] per Thawley J.

Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Jagot J

6.

examination that he constantly asked Mr Semmens for an "assurance" that he had complied with the directive in the letter set out above. The cross-examiner did not go on to ask what answers Mr Semmens had given, but, in context, it is impossible to accept that the answers would have been alarming, as distinct from comforting.

19 As for Ms Bartels, it was also found at trial, and not challenged on appeal, that she did not want Mr Semmens to misuse intellectual property belonging to others in developing the new system.<sup>7</sup> It was not put to any witness that the instructions given in writing on 3 August 2016 were a ruse to hide the true intent of the primary actors.<sup>8</sup>

20 Mr Semmens then commenced the development of his new system, to be called Toolbox, which had to be ready by 3 October 2016, when the DreamDesk licence to DDPL was due to expire. He did so on his local computer, later discarded, at the DDPL and JGM offices. He was allowed to use some other staff of DDPL and JGM in the development work. DDPL or JGM also paid some invoices from Amazon Web Services; this was a remote server used to host Toolbox.

21 Mr Meissner instructed Mr Semmens to "export the client's data out" of DreamDesk, or give that data to the clients. This did not involve the copying or use of the source code, or the use of another person's intellectual property. It simply was a transfer of a client's data, such as that of Jellis Craig (another Melbourne real estate agent), out of DreamDesk.

22 In August 2016, Mr Stoner decided that if the Toolbox venture were to proceed it should happen using a separate company from Biggin & Scott. This led in September to the incorporation of RETB and then on 1 October 2016 to the creation of the RETB Unit Trust. Mr Stoner was RETB's sole director; he owned 95% of RETB's issued share capital. Ms Bartels owned the balance of the shares and was the company secretary. The role to be played by the RETB Unit Trust is unclear. While there were some findings concerning the *proposed* structure, no findings were made about the *actual* terms of the RETB Unit Trust; about who the unit holders were; and about how profits from the exploitation of Toolbox, if any, were to flow. It is not clear whether the intellectual property associated with

---

7 *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2021) 160 IPR 362 at 376 [45] per Thawley J.

8 *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2022) 292 FCR 512 at 576 [288(1)] per McElwaine J.

7.

Toolbox was to be owned by RETB, by the RETB Unit Trust, by Biggin & Scott, or by Messrs Stoner and Semmens and Ms Bartels, and, if so, in what shares. Inferentially, having regard to Mr Stoner's decision, it is likely that Toolbox came to be owned by the RETB Unit Trust.

23 Also in August 2016, Ms Bartels met with Ms Keys of Campaigntrack P/L to discuss the possibility of Biggin & Scott moving to use Campaigntrack. The primary judge found that, notwithstanding the decision to develop Toolbox, Ms Bartels conveyed the impression to Ms Keys that Biggin & Scott was considering returning to Campaigntrack. This impression was re-affirmed in a meeting held in September 2016 with Ms Bartels and Ms Keys. That is understandable; at this time Biggin & Scott knew that the DreamDesk licence was to expire on 3 October and did not then know whether Toolbox would work. Nonetheless, the primary judge found that returning to using Campaigntrack was Biggin & Scott's least preferred option. His Honour also found that Biggin & Scott sought to "buy time" with Campaigntrack P/L before the 3 October deadline.

24 On 22 September 2016, the Chief Executive Officer of New Litho, Mr Watts, discovered that RETB had been incorporated and that the following domain had been registered in its name: "realestatetoolbox.com.au". This domain resolved to an IP address that, when entered into a browser, produced the login page for DreamDesk. Mr Watts sent screenshots of the website to Ms Keys and other officers of Campaigntrack P/L. After an investigation, it appeared to Campaigntrack P/L that DreamDesk and Toolbox were being run on the same computer. The primary judge found this to be so and inferred that it was Mr Semmens' computer which was being used.

25 At the end of September 2016, Mr Stoner advised Campaigntrack P/L that Biggin & Scott would not be using Campaigntrack and asked for the 3 October deadline to be extended to 24 October 2016. Meanwhile, Mr Semmens had deleted commits and branches from the DreamDesk "Git Repository" to make it virtually impossible for Campaigntrack P/L to prove when certain things had occurred to the DreamDesk system. A Git Repository contains the complete history of every change made in the development of the relevant source code or code base of software like DreamDesk.

*The letter of 29 September 2016 and the undertakings*

26 On 29 September 2016, Ms McLean, a solicitor acting for Campaigntrack P/L, sent an email to Mr Meissner and DDPL concerning their request to extend the licence granted to DDPL to use DreamDesk. This communication assumed great significance in the appeal to the Full Court. A

Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Jagot J

8.

majority of the Full Court formed the view that the primary judge erred in overlooking this evidence and certain events which took place thereafter (described below). The contents of this email, together with those events, led a majority of the Full Court to conclude that the appellants had authorised Mr Semmens' infringement of copyright from 29 September 2016 by their indifference to the development of Toolbox by Mr Semmens. But the better view, reached by Cheeseman J in dissent in the Full Court, is that the primary judge must have been fully aware of the email because his judgment expressly described another email sent on 3 October 2016 which itself refers to the earlier email. The primary judge did not mention the 29 September email in his reasons because of the way the case was presented to his Honour; that case evolved in a different way in the Full Court.

27 Amongst other things, the 29 September 2016 email informed Mr Meissner that Campaigntrack P/L had "become aware of improper access and duplication of code which" Campaigntrack P/L "now" owned and of the incorporation and "involvement" of RETB. Campaigntrack P/L was nonetheless prepared to extend the licence granted to DDPL to use DreamDesk for one week on the following basis:

"Dream Desk does not permit use of its platform otherwise than in the ordinary course of business;

Biggin & Scott do not use the platform otherwise than in the ordinary course of business;

All relevant parties involved provide an undertaking to our client that the intellectual property already obtained or duplicated will not be used for any purpose;

All relevant parties involved provide an undertaking to our client that the intellectual property already obtained or duplicated will be destroyed immediately."

28 Mr Meissner responded the next day and informed Ms McLean that he would agree in principle to the proposed terms. He then stated that he did not understand the reference in the 29 September email to another company, presumably RETB, and "your involvement statement". McElwaine J in the Full

9.

Court considered the foregoing comment to be disingenuous.<sup>9</sup> Mr Meissner also stated that the intellectual property purchased by Campaigntrack P/L from DDPL was being used "solely by Dream Desk contractors (no one else) for its original function only". For the purpose of making this representation, Mr Meissner had not first consulted with Mr Semmens. McElwaine J was of the view that he should have.

29 In the days which followed, this correspondence came to the attention of Mr Stoner and Ms Bartels. On 3 October 2016, Mills Oakley, acting as solicitors for Biggin & Scott and RETB, as well as Mr Stoner and Ms Bartels, requested a further extension of the DreamDesk licence and said that its clients were prepared to give the undertakings requested in the 29 September 2016 letter. There was no response to the allegation concerning improper access to, and duplication of, code. The undertakings were then prepared by Ms McLean and required, amongst other things, that DDPL, Mr Meissner and Mr Semmens undertake and agree that they would not use or copy any of the intellectual property comprising DreamDesk. The undertakings should be set out in full and were as follows (some of the references to "Dream Desk" are to DDPL):

"Dream Desk, Meissner and Semmins [sic] undertake and agree that they individually or jointly with any other person or entity will not use, market, sell, copy, duplicate or in any way enable or facilitate the development of any system by making use of any of the intellectual property which comprises and/or relates to the system of Dream Desk, which is now owned by Campaigntrack Pty Ltd to the extent that they will not permit, now or at any time in the future, access by any third party to the system known as Dream Desk for any use other than its ordinary permissible use.

Dream Desk, Meissner and Semmins [sic] also undertake and agree that they will immediately cause to be returned to Campaigntrack [sic] Pty Ltd, or if unable to be returned then destroyed so as to render useless, any of Dream Desks [sic] intellectual property or code which has already been copied, duplicated or otherwise provided to any third party or entity of any description whatsoever."

30 Mr Meissner replied immediately to confirm his agreement to give these undertakings. But he also added that he had no authority "in relation to David Semmins [sic]". On 5 October 2016, a further version of the undertakings was sent

---

9 *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2022) 292 FCR 512 at 585 [331].

Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Jagot J

10.

by Ms McLean to Mills Oakley. This version required also that undertakings be given by all of the Biggin & Scott parties. On 6 October 2016, Mills Oakley provided to Ms McLean undertakings signed by all of the Biggin & Scott parties. A copy of those undertakings was sent by Mr Stoner to Mr Semmens on 6 October 2016, but Mr Stoner was not aware that Mr Semmens had himself been requested to provide an undertaking.

31 Mr Semmens never signed his undertaking; he said it would have restricted him from working in his industry. He also said that he was never instructed to refuse to sign his undertaking.

32 On 7 October 2016, Ms McLean wrote to Mills Oakley. She stated that the DreamDesk licence would not be extended beyond 10 October 2016 because, amongst other matters, no undertaking had been received from Mr Semmens. On the evening of 10 October 2016, Biggin & Scott's access to DreamDesk ceased. But on that same day Toolbox went live. Ms Bartels sent an email to Biggin & Scott's DreamDesk users explaining what had happened. She said that things "very quickly got legal with all kinds of threats and requests that [Biggin & Scott] simply [could not] agree to". One of these was said to be a major increase in the production fees for the use of Campaigntrack.

#### *The Geri report and its consequences*

33 In November 2016, the respective solicitors for the Biggin & Scott parties and Campaigntrack P/L agreed that Mr Geri of Ferrier Hodgson, a computer forensics expert, be permitted to inspect the Toolbox system in order to prepare a "preliminary report" into whether there had been potential copying or duplication of any intellectual property relating to DreamDesk. Mr Geri attended at the offices of Biggin & Scott and was shown the Toolbox system by Mr Semmens. Mr Geri was provided with copies of the database structure for both DreamDesk and Toolbox; with programming code for both systems; with log files relating to the development of Toolbox; and with screenshots of the application of both systems.

34 Mr Geri was also supplied with a "commit log file" in response to his request for a copy of, or access to, the "GitHub repository" for Toolbox. Prior to Mr Geri's examination of the software, Mr Stoner instructed Mr Semmens to remove from Toolbox any mention of DreamDesk. Mr Semmens did this. Mr Semmens told Mr Stoner that he had changed his credentials in the commit log file from his DreamDesk email to a gmail email account. At trial, Campaigntrack P/L submitted that these changes were made by Mr Semmens to convey a false impression that, amongst other things, Toolbox had been



*Gageler CJ*  
*Gordon J*  
*Edelman J*  
*Steward J*  
*Jagot J*

11.

independently created and was not based on DreamDesk. It was alleged that this was all done on the instructions of Mr Stoner, Biggin & Scott and RETB.

35 But Mr Stoner denied that he had given instructions to Mr Semmens to make changes to the commit log file, and the primary judge accepted that evidence. Moreover, the primary judge found that Mr Stoner and Biggin & Scott simply did not want Toolbox to be based in any way on any intellectual property related to DreamDesk and also wanted to avoid any argument with Campaigntrack P/L that this was not so. Changes were thus made to Toolbox before it was given to Mr Geri.

36 Mr Geri's preliminary opinion was provided on 19 January 2017. It found that there were large similarities between Toolbox and DreamDesk and that both had been developed by the same person. He found:

"My review of the database schematic of both systems indicated large similarities which would be expected from two systems developed to provide the same functionality. It should be noted that differences in the database exist which appear to relate to how the Document builder components interact with the database.

A review of individual tables and fields identified significant similarities. A number of tables have the same structure and appear to be responsible for holding the same type of data. Of the 15 tables compared 13 have what appear to be matching fields and data types.

A review of the front end menu options and functionality of both systems was reviewed with significant similarities identified in relation to the various options available to users. A comparison of 51 different front end options available to users was undertaken between the two systems which identified exact matches between 47 of the 51 options examined.

From this review it is apparent that both the Dream Desk and Real Estate Toolbox applications provide the same end user functionality and framework required to produce Real Estate marketing content. This view is shared by Mr Semmens who acknowledged in our discussions that the applications are designed to provide the same services."

37 Mr Geri concluded that it was highly probable that there had been an infringement of Campaigntrack P/L's copyright in DreamDesk when developing Toolbox. He wrote:

Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Jagot J

12.

"In relation to my instructions regarding 'the potential copying or duplication of any intellectual property' in my opinion there is a high probability that intellectual property purchased by Campaigntrack has been used in the development of Real Estate Toolbox. The applications have been developed by the same developer who had access to both systems during the development process."

38 Mr Geri said that to confirm his opinion that intellectual property owned by Campaigntrack P/L had been used to develop Toolbox, he needed to undertake a forensic examination of the servers responsible for hosting and managing Toolbox.

39 On 19 January 2017, Ms McLean wrote to Mills Oakley and requested, having regard to the preliminary report of Mr Geri, that Biggin & Scott "shut down and cease use" of Toolbox. Ms McLean also requested that compliance be confirmed within 24 hours. Ms McLean wrote that she would seek instructions to obtain appropriate injunctive relief if Biggin & Scott refused to comply.

40 Biggin & Scott did not comply with these requests. Instead, it sought, via its solicitors, details concerning the intellectual property owned by Campaigntrack P/L, such as: proof of ownership of the intellectual property; the provision of any contract or agreement that excluded Mr Semmens from maintaining any rights in the intellectual property said to be owned by Campaigntrack P/L; and details of the prejudice suffered by Campaigntrack P/L from the continuing use of Toolbox. At first, Ms McLean did not respond. But on 3 February 2017, she sent to Mills Oakley a letter which repudiated the claims of the Biggin & Scott parties and asserted ownership of the intellectual property comprising DreamDesk as well as Process 55.<sup>10</sup> She reminded Mills Oakley of the admission made by Mr Semmens, described above, that he had misused third party property when developing DreamDesk, and sought access to a range of matters for further investigation by Mr Geri. Ms McLean described Campaigntrack P/L's prejudice as being the copying of DreamDesk and proclaimed that it was "hard to conceive of a clearer case where an injunction would issue on a permanent basis". The letter requested again that Toolbox be shut down.

41 On 9 February 2017, Mills Oakley responded. After noting that access had been given to Toolbox to Mr Geri in "good faith", and that the preliminary report had failed, in the opinion of Mills Oakley, to identify how Biggin & Scott had infringed Campaigntrack P/L's intellectual property, it rejected any further investigation by Mr Geri as an "attempt to fish for evidence". The letter

---

10 Noting the letter is mistakenly dated 3 January 2017.

represented that Toolbox did not use the source code from DreamDesk or any other component or data owned by Campaigntrack P/L.

*The end of Toolbox*

42 In April 2018, Biggin & Scott began to use a new system called Real Estate Digital HQ. In June 2018, it ceased to use Toolbox.

**Proceedings in the Federal Court**

*The proceedings at trial*

43 The liability hearing before the primary judge lasted 12 days. As Cheeseman J observed in the Full Court, the trial constituted a "fact sensitive and fact intensive inquiry".<sup>11</sup> Before the primary judge, the case against both the Biggin & Scott parties and the DDPL parties was that each had authorised the infringing acts of Mr Semmens. Relevantly, Campaigntrack P/L's case against the Biggin & Scott parties was that they had authorised the infringing acts as a result of matters including: the instruction letter issued to Mr Semmens on 3 August 2016; the power that each of the Biggin & Scott parties had over Mr Semmens; and the authority that the Biggin & Scott parties gave Mr Semmens, without audit, and their payment of Mr Semmens' accounts. Campaigntrack P/L's case against the DDPL parties was that they authorised the infringing acts by, for example, providing staff and resources in the development of Toolbox.

*The findings of the primary judge*

44 The primary judge found that Mr Semmens had been the "main developer" of Toolbox. Because it had been found that DreamDesk and Toolbox used identical source codes, the primary judge held that Mr Semmens had reproduced a substantial part of the DreamDesk Source Code Works. Mr Semmens then proceeded to modify that code, perhaps with the assistance of individuals working under his supervision. When those individuals downloaded and uploaded the Toolbox source code there was another reproduction of a substantial part of the DreamDesk Source Code Works, authorised by Mr Semmens. Thereafter, when Toolbox was applied by users, there occurred a reproduction of a substantial part of the DreamDesk Source Code Works, authorised again by Mr Semmens. In

---

11 *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2022) 292 FCR 512 at 541 [149].

Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Jagot J

14.

addition, it was found that when Toolbox went live it was based, in substantial part, on the DreamDesk Database and Table Works.

45           The primary judge made these findings about the Biggin & Scott parties:

- (a) Mr Stoner and Ms Bartels trusted Mr Semmens not to infringe the intellectual property rights of DDPL or Campaigntrack P/L in developing Toolbox and they did not want Mr Semmens to misuse intellectual property belonging to others in developing it.
- (b) Mr Stoner and Ms Bartels considered Mr Semmens to be a person who had the relevant expertise in building a software system and he could build the system in sufficient time given his expertise. They left the development of Toolbox to Mr Semmens and that was not unusual or surprising.
- (c) Biggin & Scott was in a contractual relationship with, and could instruct, Mr Semmens. Its instruction to him was relevantly to build Toolbox without infringing any person's intellectual property rights.
- (d) Given the instructions to Mr Semmens, and that Mr Stoner and Ms Bartels trusted him, there was no independent audit of Toolbox or verification that Mr Semmens had not infringed another person's intellectual property rights. In all likelihood, neither Mr Stoner nor Ms Bartels turned their mind to consider this.
- (e) Mr Stoner did not instruct Mr Semmens to "tamper" with the commit log file.
- (f) Mr Stoner, Ms Bartels and Mr Semmens were friends. The payment of Mr Semmens' legal bills in this matter did not indicate any authorisation of the infringement of copyright.
- (g) It had not been established that any of the Biggin & Scott parties knew, or should reasonably have known, that Campaigntrack P/L's intellectual property had been used to develop Toolbox.

46           Accordingly, the primary judge was not satisfied that any of the Biggin & Scott parties authorised any infringement of copyright.

47           As to the DDPL parties, there were a number of gaps in the findings and, perhaps, the evidence. Neither Mr Meissner nor DDPL appeared to be parties to the arrangement between Mr Semmens and Biggin & Scott for the development of Toolbox and it is not clear whether, and if so how, DDPL or Mr Meissner stood to

<i>Gageler</i>	<i>CJ</i>
<i>Gordon</i>	<i>J</i>
<i>Edelman</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Jagot</i>	<i>J</i>

15.

gain from this product. Further, the precise relationship between Mr Meissner and DDPL and the development and exploitation of Toolbox was never fully explained. Nevertheless, the primary judge made these findings about the DDPL parties:

- (a) DDPL and Mr Meissner participated in the development of Toolbox through DDPL and JGM, including by providing staff and resources. Mr Meissner was therefore aware of the development of Toolbox by staff of DDPL and JGM, and that Toolbox was developed at DDPL's offices in Mulgrave, Victoria.
- (b) Having been "shocked" by the use of Process 55 in developing DreamDesk, Mr Meissner did not then participate in developing Toolbox in a way that infringed the intellectual property rights he had sold to Campaigntrack P/L.
- (c) Mr Meissner's instruction to Mr Semmens to transfer client data from DreamDesk was for the purpose of turning off that system, not an authorisation to infringe intellectual property. At this time, Mr Meissner was overseas and contact with him was difficult.
- (d) DDPL or JGM paid for certain Amazon Web Services invoices, but this was not evidence of an authorisation to Mr Semmens to infringe Campaigntrack P/L's copyright.
- (e) Mr Meissner did not believe that infringements were occurring; nonetheless, he and DDPL did have the power to stop such infringements even though Mr Semmens was an independent contractor and not an employee of DDPL or Mr Meissner. This power arose from the capacity to prevent DDPL and JGM staff from assisting Mr Semmens by not paying for that work and by not paying the invoices from Amazon Web Services. Further, DDPL and Mr Meissner could issue "instructions" to Mr Semmens, although no such instructions were given, express or implied, which requested or required him to infringe any person's intellectual property rights.
- (f) Mr Semmens understood that Mr Meissner did not want him to infringe any person's intellectual property rights.
- (g) Mr Meissner was not aware of any events that called for his or DDPL's intervention. The circumstances known to him did not call for some audit or investigation into the work of Mr Semmens. Mr Semmens had the expertise to develop Toolbox; Mr Meissner did not. Given what had

Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Jagot J

16.

occurred with DreamDesk and Process 55, it was reasonable for Mr Meissner to take the view that Mr Semmens would not repeat his past behaviour of infringing another person's copyright.

48 Accordingly, the primary judge concluded that the authorisation case against the DDPL parties was not made out.

*The case presented in the Full Court*

49 The primary facts found by the primary judge were not challenged on appeal, although some of the documentary record was not expressly addressed because of the way the case was presented at first instance.

50 The authorisation case pursued by Campaigntrack P/L before the Full Court was narrower than the case pursued at trial. Before the Full Court it was contended that the appellants had authorised the infringement of copyright by Mr Semmens for the purposes of s 36(1) of the *Copyright Act* from 29 September 2016 until June 2018. They did so, it was said, because of their indifference to the development and use of Toolbox following the receipt of the 29 September 2016 letter. All of the judges in the Full Court accepted that this change in emphasis was permissible.

51 Relevantly to the change in emphasis, McElwaine J observed in the Full Court that the "importance" of the 29 September 2016 letter had not been the subject of "sufficient attention" at trial.<sup>12</sup> That "omission" became "the subject of questions from [the Full Court] upon the hearing of [the] appeal".<sup>13</sup> Two observations should be made. First, care must be taken to ensure that shifts in understanding of the matters that are, or are not, important do not mask what is in substance a departure from the settlement of the substantial issues at trial.<sup>14</sup> Secondly, this principle is not necessarily avoided by the source of the new point being the appellate court itself.

---

12 *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2022) 292 FCR 512 at 579 [305].

13 *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2022) 292 FCR 512 at 579 [305] per McElwaine J.

14 *Coulton v Holcombe* (1986) 162 CLR 1 at 7 per Gibbs CJ, Wilson, Brennan and Dawson JJ.

52 In the end, notwithstanding an attempt on appeal to this Court to rely on events which post-dated the 29 September 2016 letter, Campaigntrack P/L was unable to establish any alternative case that if there had been no authorisation of the infringement by that date then authorisation by one or more of the appellants might have occurred at a later point such as: (i) 6 October 2016, if any of the Biggin & Scott or DDPL parties became aware after that time that Mr Semmens had been asked for an undertaking and had not provided one; (ii) 19 January 2017, when Mr Geri's preliminary opinion was provided; or (iii) 3 February 2017, when the Biggin & Scott parties were asked for a range of matters to be further investigated by Mr Geri. Campaigntrack P/L was unable to establish such possible alternatives because of the way it had presented its case before the primary judge. This is explained below.

*The findings of the Full Court*

53 In the Full Court, McElwaine J, with whom Greenwood J substantially concurred, agreed with the primary judge that prior to 29 September 2016 the appellants did not know about and were not obliged to take reasonable steps to avoid the infringement of copyright by Mr Semmens. However, their Honours reached a different conclusion to that of the primary judge on the authorisation case for the period 29 September 2016 to June 2018, holding that there was authorisation by "indifference".

54 McElwaine J concluded that the primary judge did not analyse all of the evidence on the authorisation case, most notably the letter dated 29 September 2016, which, his Honour said, put the appellants on notice of Campaigntrack P/L's claims of copyright infringement. McElwaine J was therefore satisfied that the primary judge had erred by failing to make findings of fact with respect to the period from 29 September 2016 to June 2018. His Honour said that this period was "important or critical to the proper determination of the matter and [was] not referred to by the trial judge".<sup>15</sup> Consequently, it was said that the primary judge did not draw the correct inference concerning the issue of authorisation.

55 On that basis, McElwaine J was satisfied that from 29 September 2016 the appellants knew, or had reason to suspect, that Mr Semmens either had copied, or would likely copy, aspects of the DreamDesk data or source code and that they took no or insufficient steps to prevent the conduct. His Honour referred to the

---

15 *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2022) 292 FCR 512 at 583 [322], quoting *Beale v Government Insurance Office (NSW)* (1997) 48 NSWLR 430 at 443 per Meagher JA.

Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Jagot J

18.

correspondence from Ms McLean to Mr Meissner and DDPL of 29 September 2016, which was said to put those parties (and shortly thereafter the rest of the appellants) on notice that Campaigntrack P/L asserted an infringement of its intellectual property. His Honour concluded that that claim, when read with the requirement to provide certain undertakings, should have caused each of the appellants to make specific inquiries of Mr Semmens in order to be satisfied that he had not copied, and was not intending to copy, any of the intellectual property of Campaigntrack P/L in the development of Toolbox.

56 McElwaine J further held that a reasonable person in the position of each of the appellants, knowing that Mr Semmens had failed, for whatever reason, to give the requested undertakings, "ought to have made genuine and specific inquiry" of Mr Semmens as to why he had not given the undertakings, in order to determine whether his refusal was because the copying allegations were true.<sup>16</sup> Moreover, McElwaine J concluded that, following the agreement to appoint Mr Geri as an expert in November 2016 and the receipt of the preliminary report on 19 January 2017, the appellants were thereafter on actual notice of the "high probability" that intellectual property of Campaigntrack P/L had been unlawfully copied and used in the development of Toolbox. McElwaine J drew an inference that the appellants were content to be, at best, indifferent to the rights of Campaigntrack P/L, which they subjugated to the economic interests of Biggin & Scott, RETB and DDPL. How this finding applied to DDPL and Mr Meissner is entirely unclear, given that there was no evidence that either of them stood to gain from the exploitation of Toolbox; they had, it would appear, no relevant economic interest to prioritise over the rights of Campaigntrack P/L.

57 The exact nature of the appellants' indifference as to the rights of Campaigntrack P/L was never satisfactorily explained. That may be because of McElwaine J's finding that it was not open to Campaigntrack P/L to pursue a case of wilful blindness on appeal to the Full Court. Yet, the distinction between the characterisation of the appellants' conduct as indifference to the rights of Campaigntrack P/L as distinct from wilful blindness was never identified. Nor was McElwaine J's finding of actual knowledge of infringement sufficiently reconciled with the unchallenged finding of trust in Mr Semmens which was held by Mr Stoner and Ms Bartels throughout the period in question.

58 In dissent, Cheeseman J held that the primary judge's multiple unchallenged trust findings were not temporally limited and were made in the context of the

---

16 *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2022) 292 FCR 512 at 586 [333].



primary judge's assessment of the whole of the evidence, including the case put in cross-examination. Her Honour found that the appellants took active steps to co-operate with Campaigntrack P/L by giving the undertakings and by granting access to an independent expert whose preliminary report contained nothing that was capable of displacing the subsisting relationship of trust or that was capable of confirming that the allegations of infringement in the 29 September 2016 letter were well made.

59 Furthermore, Cheeseman J concluded that the absence of an express finding by the primary judge as to the existence of the 29 September 2016 letter did not establish error. Rather, the more compelling inference was that the primary judge considered the letter to be immaterial to his findings on authorisation, as demonstrated by: the nature and quality of the evidence on the issue; the context of the comprehensive findings of trust; the scant attention given to this evidence by Campaigntrack P/L at trial; and the inadequacy of any cross-examination of relevant witnesses on this evidence.

### **The grounds of appeal in this Court**

60 In this Court, the appellants challenged three findings of the majority of the Full Court, namely that from 29 September 2016 until June 2018:

- (a) the Biggin & Scott parties infringed the copyright in the DreamDesk Source Code Works by authorising the infringements of Mr Semmens and others in developing Toolbox and of users in using Toolbox;
- (b) the Biggin & Scott parties infringed the copyright in the DreamDesk Database and Table Works by authorising the infringements of Mr Semmens and of users in using Toolbox; and
- (c) the DDPL parties infringed the copyright in the DreamDesk Database and Table Works and DreamDesk PDF Works by authorising the infringements of Mr Semmens.

### **Section 36(1) of the *Copyright Act***

61 Section 36(1) of the *Copyright Act* relevantly provides as follows:

"Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright."

Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Jagot J

20.

### Authorisation

62 Section 36(1A) sets out three matters that must be considered in determining whether a person has authorised the doing of an act comprising another person's copyright in a work. It provides:

"In determining, for the purposes of subsection (1), whether or not a person has authorised the doing in Australia of any act comprised in the copyright in a work, without the licence of the owner of the copyright, the matters that must be taken into account include the following:

- (a) the extent (if any) of the person's power to prevent the doing of the act concerned;
- (b) the nature of any relationship existing between the person and the person who did the act concerned;
- (c) whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice."

63 In *Roadshow Films Pty Ltd v iiNet Ltd [No 2]*,<sup>17</sup> Gummow and Hayne JJ comprehensively traced the history of the concept of authorisation in s 36(1). Importantly, that history reveals that for at least a century it has been recognised that authorisation extends beyond its conventional meaning commonly associated with agency, by which one person's acts are attributed to the "authorising" person.

64 Authorisation also includes circumstances in which one person is so involved in the infringement that the infringer can be said to act with the "permission" of the authorising person<sup>18</sup> or to have been "sanction[ed], approve[d], [and] countenance[d]" by the authorising person.<sup>19</sup> But, as Gummow and Hayne JJ

---

17 (2012) 248 CLR 42 at 77-87 [104]-[134].

18 *Roadshow Films Pty Ltd v iiNet Ltd [No 2]* (2012) 248 CLR 42 at 78 [106] per Gummow and Hayne JJ, citing *Performing Right Society v Caryl Theatrical Syndicate* [1924] 1 KB 1 at 9 per Bankes LJ.

19 *Roadshow Films Pty Ltd v iiNet Ltd [No 2]* (2012) 248 CLR 42 at 83 [121], 84 [125] per Gummow and Hayne JJ, citing *Evans v E Hulton & Co Ltd* [1923-28] MacG Cop Cas 51 at 59-60 per Tomlin J and *Falcon v Famous Players Film Co Ltd*

emphasised in *Roadshow Films Pty Ltd [No 2]*, beyond the conventional cases involving acting with authority, the conduct of a person that will amount to sufficient involvement in the infringement so as to amount to authorisation is not to be identified by deconstructing the dictionary definitions of notions such as "sanction", "approve" and "countenance".<sup>20</sup> The sufficiency of involvement in the infringement so as to amount to authorisation requires close focus upon all the facts. As Gibbs J said in *University of New South Wales v Moorhouse*:<sup>21</sup>

"[W]hether one person authorizes another to commit an infringement depends upon all the facts of the case so that a decision on a particular set of circumstances may be of no assistance in other cases."

65 This question of fact as to whether a person's involvement in an infringement amounts to authorising the doing by another of any act comprised in a copyright work owned by a third party is decided with regard to the factors mandated by s 36(1A) of the *Copyright Act*. The types of language used in other cases to describe conduct that might constitute such authorisation, such as the words "permission" or "sanction, approve, countenance", are therefore just verbal descriptions of types of conduct that fall within the reach of s 36(1).

#### *Authorisation by "indifference"*

66 The same point applies to the need for care with verbal descriptions such as "indifference" that are not contained within s 36. Such a verbal description cannot be treated as though it were a conclusive determinant to whether there is sufficient involvement in an infringement so as to amount to authorisation. Nevertheless, the concept of "indifference" has been used in the cases as a strong guide to whether such authorisation exists. Indifference in these cases was described by Knox CJ, in dissent but not on this point of principle, in *Adelaide Corporation v Australasian Performing Right Association Ltd*:<sup>22</sup>

"[I]ndifference or omission is 'permission' within the plain meaning of that word where the party charged (1) *knows or has reason to anticipate or*

---

[1926] 2 KB 474 at 491 per Bankes LJ. See also *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12 per Gibbs J, 20 per Jacobs J.

20 (2012) 248 CLR 42 at 84 [125].

21 (1975) 133 CLR 1 at 12.

22 (1928) 40 CLR 481 at 487 (emphasis added).

Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Jagot J

22.

*suspect that the particular act is to be or is likely to be done, (2) has the power to prevent it, (3) makes default in some duty of control or interference arising under the circumstances of the case, and (4) thereby fails to prevent it."*

67 A similar approach to "indifference" was taken by Gibbs J in *University of New South Wales v Moorhouse*,<sup>23</sup> who explained the element of a failure to prevent the infringement in terms of "omitting to take reasonable steps to limit its use to legitimate purposes". This approach to indifference generally reflects the factors that later came to be required considerations when s 36(1A) was introduced.

68 Four cases illustrate the circumstances in which it has been submitted that defendants were indifferent in this sense in a manner sufficient to amount to authorisation.

69 The first case is *Performing Right Society Ltd v CiryI Theatrical Syndicate Ltd*.<sup>24</sup> In that case, the managing director of a company engaged a band to perform in a theatre it had leased. Without the managing director knowing, on two occasions the band played musical works in breach of the copyright held by the plaintiffs. Bankes LJ reasoned that the indifference must be of a special kind; it must be such as to justify an inference of authorisation.<sup>25</sup> In deciding that the managing director had not authorised an infringement of copyright, Bankes LJ quoted from an earlier decision to the effect that the managing director had not been sufficiently involved in the infringement because he "took no part in the matter"<sup>26</sup> and characterised the indifference of the managing director as that of a person who did not think it was his business to interfere, it being reasonable for him to leave copyright issues as matters for the conductor or bandmaster to address.<sup>27</sup>

---

23 (1975) 133 CLR 1 at 13.

24 [1924] 1 KB 1.

25 *Performing Right Society Ltd v CiryI Theatrical Syndicate Ltd* [1924] 1 KB 1 at 10.

26 *Performing Right Society Ltd v CiryI Theatrical Syndicate Ltd* [1924] 1 KB 1 at 11, quoting *Lyon v Knowles* (1864) 5 B & S 751 at 752 [122 ER 1010 at 1010].

27 *Performing Right Society Ltd v CiryI Theatrical Syndicate Ltd* [1924] 1 KB 1 at 10. Scrutton and Atkin LJ also held that there was no authorisation.

70 The second case, *Adelaide Corporation v Australasian Performing Right Association Ltd*, was similar.<sup>28</sup> Adelaide Corporation ("the Corporation") had let its town hall to J C Williamson Ltd for a series of concerts. Under the terms of the lease, the Town Clerk (or City Treasurer) had the power to cancel the letting; to require J C Williamson Ltd to supply a full detailed programme of what entertainment was to take place; and to stop a performance, or any particular item within that performance, if the Clerk (or Treasurer) considered it to be objectionable in their "absolute and unfettered discretion". The Corporation received a letter from the Australasian Performing Right Association Ltd ("the Association") which stated that it had "reason for believing" that musical compositions would be performed by J C Williamson Ltd in respect of which the Association was the owner of applicable copyright. A list of the compositions was attached. The Association warned the Corporation that if it permitted the compositions to be performed it would commit an infringement of copyright. The Corporation acknowledged receipt of the letter but did nothing to stop the performance in question.

71 Higgins J, in the majority, held that to show permission it had to be demonstrated that the Corporation had "willed" the musical composition to be performed and that it had "communicated that will in some way".<sup>29</sup> Because the Corporation had no specific or applicable power, it was said, to direct J C Williamson Ltd not to perform any one of the identified musical compositions, but only a more general and indirect power to break the lease, it could not be concluded that the Corporation had permitted any infringement of copyright.<sup>30</sup> Gavan Duffy and Starke JJ similarly concluded that "no inference of consent should be drawn against one who having no such right remains quiescent and declines to alter his legal relations in order to acquire such a right".<sup>31</sup>

---

28 (1928) 40 CLR 481.

29 *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481 at 500.

30 *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481 at 498-499 per Higgins J.

31 *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481 at 505.

Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Jagot J

24.

72 The third case is *University of New South Wales v Moorhouse*.<sup>32</sup> In that case, it was found that a university's indifference as to whether breaches of copyright might take place when students used its photocopiers constituted an authorisation of each such actual infringement. The university had actually taken some steps to prevent infringement. The library guide contained a bookmark headed "Copyright" which contained the following words:<sup>33</sup>

"Reader [sic] have a responsibility to obey the law under the *Copyright Act* 1968.

A copy of the Act is available in the Photocopying Room and there is an extract of relevant sections on each machine.

Photocopying may be done for the purpose of research or for private study and when a copy of the item to be copied has not previously been supplied to the person making the photocopy."

73 Then on each photocopying machine appeared a notice setting out s 49 of the *Copyright Act* as it then was. Section 49 was concerned with copying undertaken by or on behalf of librarians and not by, for example, students.

74 The steps taken by the university, however, were not reasonable exercises of its power to prevent infringement. Jacobs J, with whom McTiernan A-CJ agreed, was of the opinion that the placement of the photocopiers in the library was an invitation to a user to make such use of these machines as he or she thought fit.<sup>34</sup> The notice in the library guide did not qualify that invitation and it did not matter whether the university had actual knowledge of any particular infringement of copyright. Similarly, Gibbs J reasoned that the university must have known that it was likely that a person entitled to use the library might make a copy of a substantial part of any of its books and that a "clearly worded and accurate notice on each machine" might have made a difference as to the scope of the implied permission given to copy.<sup>35</sup> Neither the notice in the library guide nor the actual notices on the machines were of this kind.

---

32 (1975) 133 CLR 1.

33 *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 15.

34 *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 21.

35 *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 13, 15.

75 The opposite conclusion was reached on the facts in the fourth case, *Roadshow Films Pty Ltd [No 2]*.<sup>36</sup> In that case, the appellants were the owners of copyright in certain films. The respondent, iiNet Ltd, was an internet service provider. Some of iiNet Ltd's customers used the internet access supplied by it to make these films available online using a peer-to-peer file sharing system. The terms of iiNet Ltd's agreement with its customers obliged those customers, amongst other things, not to use the service to infringe third party copyright, and customers were warned that a failure to observe this requirement could lead to a suspension or termination of access to the internet. A representative organisation of the copyright owners sent to iiNet Ltd weekly notices that its customers were infringing the copyright in the films; the notices identified the infringers by reference to their IP addresses and asked iiNet Ltd to prevent further infringing. But no customer accounts were suspended or terminated. This Court decided that iiNet Ltd had not authorised the infringements of copyright.

76 This Court rejected the appellants' case of indifference giving rise to authorisation. The infringements were not bound to happen; iiNet Ltd had only a limited capacity to control the infringements; and it was reasonable for iiNet Ltd not to act upon the incomplete allegations in the notices it received without further investigation, which it was not obliged to undertake itself.<sup>37</sup> The case was "again a case of the indifference of somebody who did not consider it [their] business to interfere".<sup>38</sup>

77 The foregoing survey of authorities demonstrates that what constitutes indifference amounting to authorisation depends upon a close analysis of the facts of each case. Mere neutrality or inattention will not suffice. The quality of the indifference, and the nature of the relationship between the infringer and the alleged authoriser, must be such as to justify a conclusion that there was sufficient involvement in the infringement as to amount to authorisation of the acts constituting the breach of copyright for the purposes of s 36(1) of the *Copyright*

---

36 (2012) 248 CLR 42.

37 *Roadshow Films Pty Ltd v iiNet Ltd [No 2]* (2012) 248 CLR 42 at 70-71 [76]-[77] per French CJ, Crennan and Kiefel JJ, 90 [146] per Gummow and Hayne JJ.

38 *Roadshow Films Pty Ltd v iiNet Ltd [No 2]* (2012) 248 CLR 42 at 89 [144] per Gummow and Hayne JJ, quoting *CBS Inc v Ames Records and Tapes Ltd* [1982] Ch 91 at 112 per Whitford J.

Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Jagot J

26.

Act. The central factors to consider will be those matters in s 36(1A):<sup>39</sup> the person's power to prevent the act of infringement; the relationship between that person and the infringer; and whether the person took any reasonable steps to prevent or avoid the doing of the act, including compliance with any relevant industry codes of practice. That necessarily requires consideration of whether a person knows or has reason to anticipate or suspect an infringing act is occurring or is likely to occur.<sup>40</sup>

**Were any of the appellants sufficiently indifferent to amount to authorisation?**

78 For the reasons which follow, this is another case where up until, and including, 29 September 2016 the appellants, having engaged Mr Semmens as the third party developer with the expertise that they lacked, and having instructed him specifically not to infringe copyright, simply, and reasonably, did not consider it their business to interfere any further while he did the job they asked him to do.

79 As the issue of authorisation is fact intensive, it is important to distinguish the position of the Biggin & Scott parties from the position of the DDPL parties. It bears repeating that none of the primary findings made about those parties were challenged on appeal to the Full Court or to this Court and that this appeal was not presented with any real focus upon the different nature of the acts of the Biggin & Scott parties from those of the DDPL parties that were held to constitute the authorisation of the infringing acts.

*The Biggin & Scott parties*

80 Campaigntrack P/L alleged that the Biggin & Scott parties had authorised the acts infringing the copyright in the DreamDesk Source Code Works by Mr Semmens and others in developing Toolbox, and had also authorised the acts infringing the copyright in the DreamDesk Database and Table Works by Mr Semmens and by users of Toolbox.

---

39 The text of s 36(1A) was derived from the statements of Gibbs J in *University of New South Wales v Moorhouse* (1975) 133 CLR 1; *Roadshow Films Pty Ltd v iiNet Ltd [No 2]* (2012) 248 CLR 42 at 63 [51]-[52] per French CJ, Crennan and Kiefel JJ; see also 53-54 [22].

40 See, eg, *University of New South Wales v Moorhouse* (1975) 133 CLR 1 at 12-13 per Gibbs J.



81 The essence of the reasoning of the primary judge was that Mr Semmens was expressly instructed not to infringe copyright in developing Toolbox; that Mr Stoner and Ms Bartels trusted Mr Semmens, who was their friend; and that assurances that Mr Semmens had complied with his instructions were constantly sought and seemingly obtained. The primary judge found that the Biggin & Scott parties neither knew nor had reason to suspect that the infringing acts might be done. Without more, there could be no case of authorisation; so much was accepted by McElwaine J.<sup>41</sup>

82 It follows that the only issue is whether the letter of 29 September 2016, and the reaction to it, and the receipt of the Geri report, and the reaction to it, could make any difference to the foregoing state of affairs. As mentioned above, McElwaine J decided that these events had altered the landscape. His Honour concluded that the 29 September 2016 letter and subsequent correspondence put the Biggin & Scott parties "on notice" that Campaigntrack P/L asserted that its intellectual property rights had been infringed and that a reasonable person would have been "proactive".<sup>42</sup>

83 Forensic choices made by Campaigntrack P/L before the primary judge in the way it conducted the litigation preclude the conclusion that the Biggin & Scott parties authorised the infringing acts. As to the 29 September 2016 letter, as Cheeseman J observed, it was met by the prompt giving of undertakings, prepared in terms dictated by Campaigntrack P/L's solicitor. At that time, that was the only remedy sought by Campaigntrack P/L; no request was made for Toolbox to be shut down. The significance of the failure of Mr Semmens to provide his own undertaking is greatly diminished because it was never put to any witness that the undertakings were only proffered "for the ulterior purpose of concealing conduct that comprised infringement".<sup>43</sup> In other words, it must be accepted that they were given genuinely. As such, the conclusion reached by Cheeseman J that the provision of undertakings by the Biggin & Scott parties is consistent with those parties continuing to trust Mr Semmens is correct.

---

41 *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2022) 292 FCR 512 at 574 [282].

42 *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2022) 292 FCR 512 at 586 [333].

43 *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2022) 292 FCR 512 at 542-543 [154] per Cheeseman J.

Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Jagot J

28.

84 As to the Geri investigation, it is notable that the Biggin & Scott parties permitted it to take place and co-operated with Mr Geri. That is entirely consistent with the Biggin & Scott parties continuing to trust Mr Semmens. Moreover, Cheeseman J was correct to characterise the Geri report as "inconclusive".<sup>44</sup> Indeed, the "preliminary" conclusion that there was a "high probability" that Campaigntrack P/L's intellectual property had been used to develop Toolbox was confined to matters already known to the Biggin & Scott parties: namely, that both DreamDesk and Toolbox had been developed by the same person, who had access to both systems during the production of Toolbox. Because Mr Geri could also not confirm his conclusion, there is no sensible basis for concluding that the ongoing faith in Mr Semmens' compliance with his express instructions had now become unreasonable. In that respect, it will be recalled that the relationship between the Biggin & Scott parties and Campaigntrack P/L had soured considerably since the refusal to extend the licence for DreamDesk. The Campaigntrack system was a competitor product with Toolbox. No doubt the Biggin & Scott parties saw the attack on them in that light. As such, in defence of Toolbox, they were entitled to insist upon proper proof of Campaigntrack P/L's claims and to reject what appeared to them to be a fishing exercise. Such conduct is unremarkable in the tousel field of commercial disputation.

85 There is a further difficulty arising out of the way the trial was conducted. As Cheeseman J pointed out below, Campaigntrack P/L did not cross-examine any of the witnesses for the appellant parties "meaningfully, or at all, on the preliminary Geri report".<sup>45</sup> In that respect, it was never put to Mr Stoner that he had been put on notice of Campaigntrack P/L's claims of copying at different points of time and that he had elected not to make inquiries to determine the true position. Moreover, as Cheeseman J further pointed out, the proposition that the Geri report had changed matters was not "put fairly, or at all, to any witness".<sup>46</sup>

86 As for the correspondence between the solicitors which followed the 29 September 2016 letter, Cheeseman J observed that the authorisation by

---

44 *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2022) 292 FCR 512 at 543 [156].

45 *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2022) 292 FCR 512 at 544 [158].

46 *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2022) 292 FCR 512 at 545 [159]. See *Browne v Dunn* (1893) 6 R 67; cf *MWJ v The Queen* (2005) 80 ALJR 329 at 339 [40] per Gummow, Kirby and Callinan JJ; 222 ALR 436 at 448-449.

29.

indifference argument was not put to the relevant witnesses for the parties against whom the finding of authorisation by indifference was sought. Given the finding of continued trust, Cheeseman J was correct to reach the following conclusion:<sup>47</sup>

"That the primary judge regarded the evidence as immaterial is demonstrated by the nature and quality of the evidence in issue, the contextual setting of the comprehensive trust findings, the scant attention given to the evidence in the way in which the appellant put the case below and the inadequacy of any cross-examination of relevant witnesses on this evidence."

87 It may be accepted that the Biggin & Scott parties had the power to prevent the infringing acts by Mr Semmens and by users of Toolbox (s 36(1A)(a)). Biggin & Scott could instruct Mr Semmens. Mr Stoner and Ms Bartels could investigate the allegations and stop Toolbox from going live and being used. They had power to give access to Mr Geri to forensically examine Toolbox. It may also be accepted that Mr Semmens was an independent contractor of the Biggin & Scott parties and that they could terminate that arrangement. They also had a relationship with the users of Toolbox, who included their franchisees (s 36(1A)(b)). The Biggin & Scott parties freely gave the undertakings sought by Campaigntrack P/L and co-operated in the preliminary investigation by Mr Geri (s 36(1A)(c)).

88 Proof of an allegation of authorisation by indifference requires findings, supported by evidence, that the person was in a position and had knowledge of facts, matters and circumstances sufficient to give rise to a duty to take reasonable steps to avoid or prevent the doing of an act by another person, or else be liable for the act of that person. That is not a general inquiry. It is directed to a particular state of affairs at a particular time or times. That inquiry requires an assessment of the reasonableness, again supported by evidence, of what the person did, and what the person, in that position with that knowledge, at that particular time or times, ought to have done.

89 It was not established that the Biggin & Scott parties knew of or suspected Mr Semmens' infringing acts at any relevant time. Although, following the letter of 29 September 2016, the Biggin & Scott parties had some reason to suspect that the infringing acts might be occurring, and although they had the necessary means to prevent these infringing acts, this Court cannot conclude that they defaulted in some duty of control by failing to take any further action. Given the manner in

---

47 *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2022) 292 FCR 512 at 545 [160].

Gageler CJ  
Gordon J  
Edelman J  
Steward J  
Jagot J

30.

which the case was conducted at first instance, the Court cannot conclude that the Biggin & Scott parties omitted to take reasonable steps after 29 September 2016, being steps that they ought to have taken to prevent or avoid the infringing acts.

90 The majority of the Full Court erred in concluding that the Biggin & Scott parties authorised the infringing acts after 29 September 2016.

*The DDPL parties*

91 Campaigntrack P/L alleged that the DDPL parties had authorised the infringement by Mr Semmens of the copyright held in the DreamDesk Database and Table Works as well as the DreamDesk PDF Works.

92 The conduct of the DDPL parties, however, fell far short of any conclusion that either of these parties authorised the infringement of copyright by Mr Semmens. Neither DDPL nor Mr Meissner was a party to the arrangement to develop Toolbox. There is no evidence that either DDPL or Mr Meissner was to become a unitholder in the RETB Unit Trust. There is no evidence that either of them, directly or indirectly, was going to obtain an ownership interest, directly or indirectly, in Toolbox, or was to profit in any way from its commercial exploitation. Indeed, it cannot be concluded that Mr Meissner knew or ought to have known that Mr Semmens had infringed Campaigntrack P/L's copyright when the finding was that he was originally "shocked" to discover that Mr Semmens had used Process 55, thus forcing Mr Meissner to sell DreamDesk, and that he was overseas for a large part of the time. Moreover, when required to give the undertakings sought by Campaigntrack P/L, he gave them immediately. On that basis, the primary judge was correct not to accept that Mr Meissner had participated in developing a new system, in competition with the purchaser of DreamDesk, in a way which infringed the intellectual property rights just transferred.<sup>48</sup> It follows that McElwaine J's finding that Mr Meissner's response to the 29 September 2016 letter was "disingenuous"<sup>49</sup> was not open on the evidence given how the case was run at trial.

93 Mr Meissner and DDPL's involvement with Toolbox amounted to allowing the system to be developed at the premises of DDPL at Mulgrave; allowing some

---

48 *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2021) 160 IPR 362 at 439 [305(1)] per Thawley J.

49 *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2022) 292 FCR 512 at 585 [331].

of DDPL's and JGM's staff to assist Mr Semmens; and the payment of some invoices from Amazon Web Services. None of this amounts to authorisation. That conclusion cannot change because the primary judge found that Mr Meissner and DDPL had the power to prevent the infringement; to the knowledge of each of these parties there was nothing to prevent and, as the primary judge found, "Mr Meissner did not know of any events which called for his (or DDPL's) intervention"<sup>50</sup> – at least until 29 September 2016.

94           The question is whether the letter of 29 September 2016 altered that conclusion. For the reasons that follow, the majority of the Full Court erred in concluding that the DDPL parties authorised the infringing acts after 29 September 2016.

95           It may be accepted that given that DDPL contributed some staff and resources to developing Toolbox, it had some power to avoid or prevent the infringing acts (s 36(1A)(a)). The DDPL parties also had contractual relations with Mr Semmens and the other developers (s 36(1A)(b)). But, as explained, neither DDPL nor Mr Meissner was a party to the arrangement between the Biggin & Scott parties and Mr Semmens relating to Toolbox, and there was no evidence to establish that DDPL or Mr Meissner had any interest in the Toolbox system.

96           The primary judge and the majority of the Full Court found that the DDPL parties took no steps to prevent or avoid the infringements in developing Toolbox and in moving data from DreamDesk to Toolbox. That may be accepted. It can also be accepted that from 29 September 2016, the DDPL parties had notice of Campaigntrack P/L's allegation and therefore had some reason to suspect Mr Semmens' actions. But given the nature and extent of the relationship that the DDPL parties had with Mr Semmens, and in light of the manner in which the case was conducted at first instance, this Court cannot conclude that the DDPL parties omitted to take reasonable steps after 29 September 2016 that they ought to have taken to prevent or avoid the infringing acts (s 36(1A)(c)).

## **Relief**

97           The appeal should be allowed. The orders made by the Full Court on 6 July 2022 and on 19 July 2022 must be set aside, and in lieu thereof the appeal should

---

50   *Campaigntrack Pty Ltd v Real Estate Tool Box Pty Ltd* (2021) 160 IPR 362 at 440 [305(6)] per Thawley J.

<i>Gageler</i>	<i>CJ</i>
<i>Gordon</i>	<i>J</i>
<i>Edelman</i>	<i>J</i>
<i>Steward</i>	<i>J</i>
<i>Jagot</i>	<i>J</i>

32.

be dismissed with costs. The first respondent should pay the costs of the appeal to this Court.

